

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A113/2013

In the matter between:

AUBREY YOLA

1st Appellant
(Accused 2 *a quo*)

REGINALD RAMABANDA

2nd Appellant
(Accused 3 *a quo*)

and

THE STATE

Respondent

CORAM: C.J. MUSI, J *et* MBHELE, AJ

HEARD ON: 5 MAY 2014

JUDGMENT BY: MBHELE, AJ

DELIVERED ON: 19 JUNE 2014

- [1] The two appellants were charged with robbery with aggravating circumstances, they were both convicted of robbery and each sentenced to 15 (fifteen) years imprisonment.

- [2] The first appellant was granted leave to appeal against the sentence only, while the second appellant was granted leave to appeal against both conviction and sentence, by the trial court.
- [3] The facts that led to the conviction of appellants were as follows: The first appellant and accused 1 in the court *a quo* were at Nedbank at Mimosa Mall on the morning of the incident. The complainant withdrew R5 000,00 from Nedbank at Mimosa Mall. The first appellant and accused 1 were at the bank at the same time as the complainant. Appellants followed the complainant from Mimosa to East End. The travelling time between Mimosa and East End is about 15 minutes.
- [4] Second appellant was the driver of the vehicle that transported first appellant and accused 1 from Mimosa Mall to East End. First appellant and accused 1 got off the vehicle.
- [5] The complainant was riding a motor bike from Mimosa Mall to East End where he went to pay the person who was fixing his car. On his arrival at East End, he parked his motor cycle and took out R1 400,00 from the seat of the motor cycle and put it in his pocket. Suddenly he was ambushed by four people and one of his assailants took R1 400,00 out of his pocket and demanded more money as the person knew that he still had more money in his possession. He unlocked the seat of the motorbike and took out the remaining R3 600,00 and gave it to his assailants who were armed with an object resembling a

sharpened Allen key.

- [6] The second appellant was identified by the complainant as one of his assailants. The complainant screamed for help and his assailants ran down the street and got away in a white Mazda sedan. The second appellant was the driver of the vehicle.
- [7] They chased after the vehicle with assistance from community members who were in the vicinity. The motor vehicle stopped somewhere alongside the N10, near the township and the occupants ran into nearby houses. Three of the occupants were arrested and the second appellant was one of them.
- [8] One of the witnesses, Mr Wouter Smartryk de Kock, who is a traffic engineer, noticed a car driving on the wrong side of the street with its doors open. The manner in which the car was approaching caught his attention owing to his knowledge of traffic rules. While the car was still driving slowly people jumped into the said vehicle and it drove away at a very high speed. There were people chasing after the car and he joined them. They chased after the car up until it stopped on the N10 and people jumped out of it and ran into nearby houses. Three occupants of this car were arrested.
- [9] The second appellant's version is that he is a taxi driver. On the date of the incident he received a call from the first appellant requesting him to give him a ride to Mimosa from

Tempe. At Mimosa Mall the first appellant brought other two people and requested the appellant to take them to East End. On his arrival at East End the first appellant got off the car and told the second appellant to wait for them in the car as he was going to fetch money from his debtors. Suddenly he saw the first appellant and accused 1 being chased by a group of white people who were hurling insults and throwing stones at them. They jumped into the car and told him to drive off immediately. He drove off immediately. The people pursued them with about four cars. He drove off because he wanted to protect his employer's car from being damaged by the angry mob. When he could not keep up he stopped the car and jumped out. He was then arrested by two white males.

- [10] The court *a quo* was in a more favourable position than this court to form a judgment on facts. The court of appeal can only interfere with the judgment of the court *a quo* if it has been established that there were misdirections of fact or if it has overlooked other facts or probabilities. In **S v Francis** 1991 (1) SACR 198 (A) it was said that:

“The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify

interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony.”

[11] Having perused the record and considered reasons advanced by the court *a quo*, I am satisfied that there were no misdirections.

[12] It is clear from the evidence that second appellant took part in the robbery by providing a getaway car. There was no way the first appellant and accused 1 would have known the complainant's destination without them having to follow him from Mimosa Mall to East End. The second appellant should have been told to follow a specific individual riding a motor bike. The complainant identified the second appellant during robbery and gave a graphic description of him and his observation was not successfully challenged. His defence that he was a mere taxi driver, cannot hold centre in the face of the overwhelming evidence brought by the state witnesses. I could not find fault in the reasoning of the court *a quo* and find the conviction to be in order.

THE SENTENCE

[13] It is trite that the court of appeal will not interfere with the sentence of the trial court unless it is satisfied that the sentence is tainted by misdirections or is shockingly inappropriate.

[14] Both parties are in agreement that the sentence of 15 (fifteen) years is disturbingly inappropriate in respect of the first appellant. The Respondent argued that in respect of the second appellant the sentence is appropriate taking into consideration his previous convictions.

[15] The court *a quo* convicted the appellants of robbery and sentenced them to the maximum sentence. The following was said in relation to sentence by the court *a quo* at page 134 of the record:

“The court will however be cautious not to overemphasise the deterrent aspect and will ensure that the sentence fits yourself as well as the crime. The court will in addition temper the sentence with a lot of mercy. Mercy means that justice must be done with compassion and humanity, not by rule of thumb and that the sentence must be assessed, not callously arbitrarily or vindictively, but with due regard to the weakness of human beings and their ability or weakness to succumb to temptation.”

The court *a quo* paid lip service to the aforementioned paragraph and her words were not reflected in the final outcome.

[16] Both Mr Makhene, for the appellants, and Ms Liebenberg, for the respondent, argued that the court sentenced the appellants as if the provisions of Act 105 of 1977 were applicable to the specific offence. I agree. Ms Liebenberg however further

argued that the sentence imposed on the second appellant is just and appropriate regard being had to his previous convictions.

[17] I have considered both appellants' personal circumstances as stated below. Both appellants were in custody, awaiting trial for a period of 22 months. The first appellant was 27 years of age, self-employed, selling clothing, generating a monthly income of about R1 500,00, married with one child who was 2½ years old at the time. He has a previous conviction for theft committed in 2000 when he was sixteen years old. Sentence was postponed for four years with conditions.

[18] The second appellant was 39-years of age, married with two children, employed as a taxi driver and earning R2 000,00 per month. He was a sole bread winner. He has the following previous convictions; theft committed in 1993, escaping from lawful custody and robbery committed in 1996. He was sentenced to 3 months imprisonment, suspended with conditions for both theft and escaping from lawful custody. In 1996, he was sentenced to 10 years imprisonment for robbery and served 9 years of the 10 years. Since his release in 2005 he came into contrast with the law for the first time in 2009.

[19] The appellants were convicted of robbery, not robbery with aggravating circumstances, which conviction falls outside the ambit of Act 105 of 1997. The respondent has already

conceded that in respect of the first appellant, this court may interfere with the sentence imposed by the court *a quo*.

- [20] The second appellant's list of previous convictions, are an indication that he has a propensity to commit offences similar to the one he has been convicted of. In **S v THONGA** 1993 (1) SACR 365 (V):

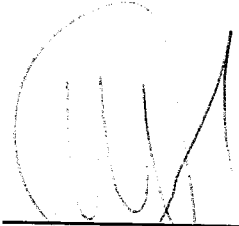
"In my view the punishment must firstly be reasonable, i.e. it should reflect the degree of moral blameworthiness attaching to the offender, as well as the degree of reprehensibleness or seriousness of the offence. Punishment therefore should ideally be in keeping with the particular offence and the specific offender. It is necessary, secondly, for the punishment to clearly reflect the balanced process of careful and objective consideration of all relevant facts, mitigating and aggravating. The sentence should, thirdly, reflect consistency, as far as is humanly possible, with previous sentences imposed on similar offenders committing similar offences, lest society should believe that justice was not seen to be done. Lastly, the penal discretion is to be exercised afresh in each case, taking the facts of each case and the personality of each offender into account."

I align myself with the remarks made in the aforementioned case. I am of the view that the court *a quo* failed to exercise its sentencing discretion judiciously. The court *a quo* placed undue emphasis on the interests of the community and seriousness of the crime. As a result this court is entitled to temper with and impose an appropriate sentence.

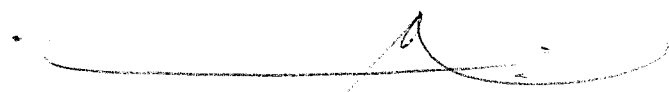
[21] I am satisfied that the seriousness of the offence calls for a custodial sentence even when tested against the personal circumstances of the Appellants. The following factors militate against a non-custodial sentence: The offence was pre-planned and the appellants showed no signs of contrition.

[22] I therefore make the following order:

1. The appeal of second appellant against conviction is dismissed.
2. The appeal against sentence in respect of both appellants, succeeds.
3. The sentences imposed by the court *a quo* are set aside and replaced with the following sentences:
“7 (seven) years’ imprisonment for the first appellant;
12(twelve) years’ imprisonment for the second appellant”
4. The sentences mentioned in paragraph 3 are antedated to 2 September 2011.


N.M. MBHELE, AJ

I concur.


C.J. MUSI, J

On behalf of appellant:

Adv J.S. Makhene
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv E. Liebenberg
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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